Supreme Court, U.S.
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No. 98-137

In The

Supreme Court of the United States

October Term, 1997

ERICA RESNER and MARY LOU RESNER,

Petitioners,

vs.

ARC MILLS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

There are no parent companies or nonwholly owned subsidiaries of Respondent Arc Mills Corp.

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STATEMENT OF THE CASE

In this case, the trial court made detailed findings of fact concluding that Petitioners failed to establish a *prima facie* case of discrimination under Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1998), and that, in any event, Respondent Arc Mills Corp. ("Arc") had articulated a legitimate non-discriminatory reason for terminating the employment of Petitioner Mary Lou Resner ("Mary Lou"). The Second Circuit affirmed this holding under a clearly erroneous standard, stating that "the plaintiffs do not point to any evidence that was overlooked by the District Court, they merely argued that the District Court came to the wrong conclusion after reviewing the evidence." (A 7)[1]

Petitioners now seek certiorari claiming that the District Court overlooked a factual issue — despite the fact that the District Court made a specific finding on this exact point. Through blatant misstatements of fact, Petitioners again seek to reargue their factual assertions. For this reason, the Petition for Certiorari should not only be denied, but appropriate sanctions should be awarded.

A. The Trial

This action was commenced in the United States District Court for the Southern District of New York in April 1995. Petitioners alleged that Arc decided to terminate Mary Lou in October 1993 because of its alleged concerns about the possible increase in the cost of its company sponsored health insurance

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1. ("A") refers to the summary order of the Second Circuit which was annexed as Exhibit A to the petition for writ of certiorari; ("B") refers to the Findings of Fact and Conclusions of Law of the District Court, annexed as Exhibit B to the petition; and ("JA") refers to the joint appendix on appeal in the Second Circuit Court of Appeals.

policy as a result of an accident suffered by Mary Lou's daughter, Erica, eighteen months earlier, which rendered her a quadriplegic.

The evidence at trial established that Mary Lou's employment was terminated as part of a reduction in force that resulted in the simultaneous termination of three other employees. Mary Lou's position in the credit department has not been replaced, and the credit department has since further reduced its staff. Since October 1993, the position of only one of the four terminated employees has been replaced. (B 5)

The trial court found that the reason for the reduction in force was because Arc was concerned about the state of the textile industry and determined that the upcoming year would not be as successful as 1993. (B 3) The financial documents introduced into evidence demonstrated that Arc's predictions were accurate. (B 4) The trial court further accepted Arc's testimony that the reason it decided to terminate Mary Lou's employment was because she continually complained that she had too much work to do and needed assistance, while her co-employee in the credit department, Lazlo Herczfeld ("Herczfeld"), advised management that he had additional time to complete his work and could perform additional duties. (B 4) Mary Lou admitted that she had made these complaints to management. (JA 37, 39-41)

Although petitioners' instant petition for certiorari is premised upon the notion that the trial court never considered why Arc decided to terminate May Lou, rather than Herczfeld, the trial court expressly found that:

> Mr. Klein [Arc's vice president who was responsible for the terminations] determined that the Credit Department was overstaffed. He selected Mary Lou

> Resner as the "most expendable" employee in the Department, although he believed her work had been generally satisfactory, *because Ms. Resner continued to claim that she needed assistance in dealing with the growing volume of factored accounts, while Mr. Herczfeld assured him that he was eager to take on Ms. Resner's work in addition to its own.*

(B 4, emphasis added).

The trial court further concluded that Arc had demonstrated that Erica's health condition played no role in its decision. Indeed, as the trial court found, Arc actually requested that its health insurer, CHUBB Life America ("CHUBB"), cover the cost of live-in care for Erica on an "extra-contractual basis", Arc made an interest-free loan of $6,000 to Mary Lou in order for her to obtain a specially equipped van for Erica, and Arc voluntarily agreed to pay petitioners' health insurance payments from October 1, 1993 through December 31, 1993, and continued to make these payments through May 30, 1994, thereby creating an incentive for both Mary Lou and Erica to remain on Arc's health plan. (B 5-6) Further, after December 1994, when Arc was advised that Erica could not be covered under the health plan because she now qualified for Medicare benefits, Arc made efforts to seek continued coverage for petitioners under the Company's group plan. (B 6)

Contrary to Petitioners' premise of discrimination, Erica's medical condition did not cause Arc to incur any additional costs. As the trial court found, documents produced from both CHUBB and Aetna, Arc's health insurer beginning in January 1995, demonstrated that Erica's condition had no impact upon the premiums charged to Arc, because premiums were based upon a general community rating, rather than the claims

experience of the employees. (B 7) In addition, as the trial court found, the cost of dependent coverage was paid by employees, and was not paid by Arc, and any alleged increased premium as a result of Erica's medical condition would therefore not be borne by Arc. (B 7-8)

B. The Court's Decisions

After reviewing and marshalling the evidence, the trial court concluded that:

> [P]laintiffs have not satisfied even the minimal burden necessary to establish a *prima facie* case . . . Nothing that plaintiffs established at trial persuaded me of the required specific motivation: plaintiffs have not demonstrated, by direct or circumstantial evidence, that Arc was more likely motivated by the unlawful intent to prevent the Resners from exercising their benefits under the employee health plan than not.

(B 14-15)

The trial court further concluded that

> even if plaintiffs had established a *prima facie* case, they have not come forward with any evidence to overcome the evidence presented by Arc that it had a legitimate, nondiscriminatory motive to discharge Ms. Resner.

(B 16)

On August 12, 1997, Petitioners appealed the trial court's findings of fact to the Second Circuit Court of Appeals. On April 22, 1998, the Court of Appeals affirmed the trial court's

decision. The Second Circuit deferred to the district court's "credibility assessment" (A 7) and concluded that:

> In reviewing the record as a whole, we find that the district court's determination that plaintiffs had failed to meet their burden of proving that Arc Mills' termination of Mary Lou was the result of unlawful discrimination was not clearly erroneous.

(*Id.*)

C. The Misstatements of Fact

In support of their petition, Petitioners have mischaracterized and misstated the facts. As already shown, their "Question Presented" is based on a false premise since the trial court made a specific finding that Arc had decided to terminate Mary Lou, rather than Herzcfeld, due to her continued complaints that she needed further assistance.

The petition for certiorari is replete with other misstatements of fact. Petitioners claim that Erica's accident "caused respondent to incur increased medical insurance premiums for Arc's employees and their dependents." This statement is completely false, as the trial court found, based upon documents provided by CHUBB, Arc's medical insurer between 1992 and 1995, that proved that Erica's condition had no impact upon the premiums paid by Arc. (B 7)

Petitioners' claim that in 1993 "Arc made it a practice to shop for better rates and moved from carrier to carrier to carrier" is also false. As the trial court found, Arc did not in any way seek a new medical insurer during 1993. It was only in the Spring of 1994 that Arc first began to solicit bids from other insurers. (B 6)

Petitioners further claim that

> [a]fter Erica's accident, Arc against tried to switch carriers. Arc applied to a well-known low-cost carrier but their application was summarily rejected specifically due to Erica's condition. Mary Lou was then fired, purportedly for reasons of cost-cutting.

This supposed event never occurred. Arc did not try to switch carriers until the Spring of 1994, more than two years after Erica's accident, which occurred on April 11, 1992, and nine months after Mary Lou was terminated in October 1993. (B 6) In addition, when Arc obtained new insurance during 1994, both Mary Lou and Erica were beneficiaries of the Arc plan — they were part of the company roster submitted for coverage. (B 7)

Petitioners claim that Mary Lou "introduced the company to the benefits of assigning their receivables to factors and earned the company many millions as a result." This so-called fact was never raised at trial and in any event is wholly untrue. In addition, there was nothing in the record that indicated that Herczfeld "had no prior experience with factoring."

Petitioners assert that Arc "knew that firing Mary Lou would save $120,000.00 in the first year alone so she was fired." The factual record does not contain anything related to cost-savings of $120,000. As the trial court found, Erica's condition never affected the cost of Arc's health insurance.

In an attempt to support their new argument that Herczfeld should have been fired, Petitioners state that "[a]t the time that Mary Lou was fired, Herczfeld was suspected for petty thievery." While Mary Lou testified that she witnessed Herczfeld engage in petty thievery, she never informed Arc

management of this act. In fact, Arc only found out about this incident during Mary Lou's deposition.

Petitioners must not be allowed to creatively manufacture facts. The string of outright falsities occurs throughout Petitioners' writ and cannot be considered mere innocent misstatements of fact. It is not surprising that these factual assertions are not supported by any reference to the record.

REASONS FOR DENYING THE WRIT AND AWARDING SANCTIONS

Petitioners cite no split in legal authority, or other legal issue, as the foundation for their request for certiorari. The only question presented for review is whether this Court should entertain an appeal of a factual issue that supposedly was overlooked by the trial court.

In fact, Petitioners' "Question Presented" itself is based on a flagrantly false premise — *i.e.*, that the trial court failed to consider why Arc terminated Mary Lou rather than Herczfeld. As discussed above, Paragraph 10 of the Trial Court's Findings of Fact and Conclusions of Law expressly deals with this issue and provides that Arc decided to terminate Mary Lou, rather than Herczfeld, because Mary Lou continually requested more assistance in order to complete her work, whereas Herczfeld had requested more work. (B 4) Petitioners' contention that the trial court simply failed to consider this issue is therefore patently false.

Moreover, at trial, and in their appeal to the Second Circuit Court of Appeals, Petitioners did not argue that Mary Lou was somehow more qualified than Herczfeld nor did they dispute the fact that Mary Lou complained to management about completing her work. Indeed, Mary Lou admitted she made

such complaints. (JA 37-44) Rather, Petitioners argued that the termination of all four employees was a guise for eliminating Erica from Arc's medical plan. Petitioners should not now be allowed to set forth new arguments before this Court that were not put before the trial court or the Circuit Court of Appeals. *See Miree v. DeKalb County*, 433 U.S. 25, 33-34 (1977). ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it." (citing *Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958))); *Ellis v. Dixon*, 349 U.S. 458, 459 (1955), *reh'g denied*, 350 U.S. 855 (1955) ("The question of whether the regulations are unconstitutionally vague was not raised below, and hence is not open here.").

Given that Petitioners' Question Presented is based on a false premise and the sheer number of untruths stated in the writ, as well as the fact that there is simply no basis for further review of the trial court's credibility and factual determinations, the Supreme Court should find that the instant Petition is frivolous and that Petitioners', and/or their counsel, should be sanctioned pursuant to United States Supreme Court Rule 42.2 which provides:

> When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

Sup. Ct. R. 42.2; *see, e.g.*, *Slaker v. O'Connor*, 278 U.S. 188, 190 (1929) ("[W]here a writ of error or appeal is dismissed

because the alleged ground therefor is so unsubstantial as to be frivolous, a penalty may be imposed."); *Wagner Electric Mfg. Co. v. Lyndon*, 262 U.S. 226 (1923); *Texas & P.R. Co. v. Prater*, 229 U.S. 177 (1913) (where appeal to Circuit Court of Appeals and Supreme Court involves factual issues and no question of law, damages may be awarded); *Deming v. Carlisle Packing Co.*, 226 U.S. 102, 109 (1912) (award of damages because of "frivolous and unsubstantial nature" of question presented).

CONCLUSION

This Case does not merit further review by this Court. For the foregoing reasons, Mary Lou Resner and Erica Resner's Petition should be denied and Petitioners and/or their counsel should be appropriately sanctioned.

Dated: September 18, 1998

Respectfully submitted,

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